

STATE OF DELAWARE
OFFICE OF
AUDITOR OF ACCOUNTS

DUAL EMPLOYMENT
PERFORMANCE AUDIT
YEAR ENDED JUNE 30, 2007

FIELDWORK END DATE: FEBRUARY 21, 2008

R. THOMAS WAGNER, JR., CFE, CGFM, CICA
AUDITOR OF ACCOUNTS

Townsend Building, Suite 1
401 Federal Street
Dover, DE 19901
TELEPHONE 302-739-4241
FACSIMILE 302-739-2723
www.state.de.us/auditor/index.htm

EXECUTIVE SUMMARY

BACKGROUND

Delaware Code, Title 29, Chapter 58, Subchapter 3 (Sections 5821, 5822, and 5823) is referred to as the Dual Employment Law. This law was enacted in July 1986. The law states that "there are numerous elected State officials and other paid appointed officials who are also employed by State agencies, educational and other institutions, and other jurisdictions of government within the State." The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday. The State is required to have clear policies and procedures in place to ensure that taxpayers of the state and various government jurisdictions are not paying employees or officials from more than one tax-funded source for duties performed during coincident hours of the workday. The State's policy regarding Dual Employment is included in Section 5822 of the Delaware Code.

AUDIT CONCLUSIONS AND OBSERVATIONS

The following is a summary of the audit observations detailed in the finding and recommendation section of this report:

- Red Clay School District underpaid one employee a total of 5.33 hours or \$306.72. New Castle County Vocational Technical School District overpaid one employee 20.75 hours or \$836.43. The findings resulted in net dual employment coincident time valued at \$529.71 being paid by the State of Delaware for Fiscal Year 2007. This represents less than 1/10 of 1% of State of Delaware compensation earned by the ten employees reviewed during this audit engagement.
- Red Clay School District did not have written dual employment policies and procedures. In addition, Delaware Technical and Community College did not have written policies and procedures regarding compensatory time.
- The Office of the Controller General, in taking attendance at certain committee meetings, does not record the time in which the State employee who is also an elected or appointed official enters the committee meeting. Due to this lack of documentation, the Auditor of Accounts (AOA) cannot ensure that employees who serve on legislative committees are not paid from more than one tax-funded source.
- During the course of fieldwork the AOA identified instances where legislators have chosen to remain at their primary State job, rather than attending a scheduled committee meeting or legislative session, thus receiving compensation from two State sources concurrently. As an example, a legislator who works at their primary State job from 8 a.m. to 1 p.m., before leaving to attend a committee meeting that commenced at 10 a.m., would receive compensation from both their primary State job and their legislative pay for the overlap time.

EXECUTIVE SUMMARY

The AOA is faced with having to audit in accordance with a statute that does not provide any remedy for activities that directly conflict with policies set forth in the Delaware Code, Title 20, Chapter 58, Section 5821.

The AOA is recommending that the General Assembly revisit the current statute regarding Dual Employment and amend to resolve this issue. See **Appendix B** for the Attorney General's opinion regarding legislative committee meetings.

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AUDIT AUTHORITY

Title 29, Del. C. c. 29 authorizes the Auditor of Accounts to perform post audits of all the financial transactions of all State agencies. The law requires that the audits be made in conformity with generally accepted auditing principles and practices. Such principles and practices are established by two standard setting bodies: the American Institute of Certified Public Accountants, which has issued generally accepted auditing standards, and the U.S. General Accountability Office, which has issued generally accepted government auditing standards.

Title 29, Del. C. §5823 authorizes the Auditor of Accounts to perform an annual audit of time records to determine whether or not an employee was paid from more than one tax-funded source for working coincident hours of the day. The State Auditor is mandated to report any discrepancy found to the Public Integrity Commission for investigation and/or the Attorney General for possible prosecution.

BACKGROUND

Delaware Code, Title 29, Chapter 58, Subchapter 3 (Sections 5821, 5822, and 5823) is referred to as the Dual Employment Law. This law was enacted in July 1986. Delaware Code, Title 29, Section 5821 states, "(a) There are numerous elected state officials and other paid appointed officials who are also employed by state agencies, educational and other institutions, and other jurisdictions of government within the State. (b) The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday. (c) The State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole, and of its various governmental jurisdictions, are not paying employees or officials from more than 1 tax-funded source for duties performed during coincident hours of the workday."

The State's policy regarding Dual Employment is included in Title 29, Del. C § 5822 states, "(a) Any person employed by the State, or by any political subdivision of the State, including but not limited to any county, city or municipality, who also serves in an elected or paid appointed position in state government or in the government of any political subdivision of the State, including but not limited to any county, city or municipality, shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected or paid appointed position which requires the employee to miss any time which is normally required of other employees in the same or similar positions. (b) Any day an employee misses work due to his or her elected or paid appointed position, he or she shall have his or her immediate supervisor verify a time record stating specifically the number of hours worked that day; said verification to take place at least once every pay period. (c) All time records, so verified, shall be kept by the immediate supervisor until such time as they are required by the State Auditor. (d) No employee shall be permitted to make up time during hours other than the normal workday for purposes of compensation. A normal workday is defined by Merit Rule 5.0200. A standard work schedule is defined by Merit Rule 5.0210. (e) Any hours or days during which any employee uses vacation, personal, or compensatory days to which he or she is entitled shall not constitute hours or days which fall within the scope of this subchapter. (f) School administrators whose duties require that they work regularly during summer months shall not be exempted from this chapter. If a school administrator shall have no immediate supervisor, the school administrator's time record shall be verified by the appropriate school board at its next regular or special meeting following any pay period in which said administrator missed work due to his or her elected or paid appointed position."

Delaware Code, Title 29, Section 5823 states, "(a) The State Auditor shall conduct an annual audit of the time records which have been kept by the supervisors or school board in accordance with §5822(b) and (c) of this title to determine whether or not an employee was paid from more than 1 tax-funded source for working coincident hours of the day. (b) Any discrepancy found by the State Auditor shall be reported to the Public Integrity Commission for investigation pursuant to § 5810 of this title and/or to the Office of the Attorney General for possible prosecution under § 876 of Title 11 (tampering with public records in the first degree) and any other appropriate section."

OBJECTIVES, SCOPE, & METHODOLOGY

OBJECTIVES

The objectives of this performance audit were:

1. Determine if State Agencies, Departments, and School Districts are in compliance with the Dual Employment Law.
2. Determine if elected or other paid appointed officials' pay was appropriately reduced or vacation, personal, or compensatory time was charged for time served in the elected or appointed position which required the employee to miss time during the normal workday.
3. Review all allegations related to dual employment received by AOA that fall under the audit period.

SCOPE

The scope of this audit included State of Delaware legislators and State Board of Education members working as State employees at agencies, departments, divisions, and school districts. Selection of employees for review was based on compensation received from another department greater than or equal to \$15,000 for Fiscal Year 2007, auditor judgment, and percentage of coverage. Because time attendance records are not maintained for committee meetings, AOA utilized the meeting minutes (including listing of legislators present) in conjunction with the start and end times of these meetings for time attendance documentation and coincident time calculations.

There were no allegations received by either the AOA Hotline or the State Auditor during the scope of this audit.

METHODOLOGY

The audit was performed in accordance with *Government Auditing Standards* applicable to performance audits issued by the Comptroller General of the United States.

The following procedures were performed:

- Determined the population of State of Delaware legislators and State Board of Education members working as State employees at agencies, departments, divisions, universities, and school districts. This included consultation of the Attorney General's office regarding whether or not University of Delaware employees should be included in the scope of our audit. See Attorney General's opinion letter regarding the University of Delaware at **Appendix C**.
- Selected a sample of elected or appointed officials, who were also State employees during Fiscal Year 2007 paid with more than one tax-funded source (using scope discussed above).
- Obtained dual employment and compensatory policies from departments/divisions/agencies selected for test work.

OBJECTIVES, SCOPE, & METHODOLOGY

- Obtained timesheets and leave records for the Fiscal Year 2007 legislative session for the selected sample of elected or appointed officials.
- Reviewed timesheet and leave records to determine if employees were in compliance with dual employment law for the selected sample of elected or appointed officials.

CONCLUSIONS

OBJECTIVE 1

Determine if State Agencies, Departments, and School Districts are in compliance with the Dual Employment Law.

State agencies, departments, and school districts were in compliance with the dual employment law, except for the following:

- Delaware Technical and Community College did not have written compensatory policies and procedures.
- Red Clay School District did not have written dual employment policies and procedures.

OBJECTIVE 2

Determine if elected or other paid appointed officials' pay was appropriately reduced or vacation, personal, or compensatory time was charged for time served in the elected or appointed position which required the employee to miss time during the normal workday.

Elected officials' pay was appropriately reduced or vacation, personal, or compensatory time was charged for time served in the elected or appointed position, which required the employee to miss time during the normal workday, except for the following:

- Red Clay School District underpaid one employee a total of 5.33 hours or \$306.72.
- New Castle County Vocational Technical School District overpaid one employee 20.75 hours or \$836.43.

In addition, the Office of the Controller General, in taking attendance at certain committee meetings, does not record time attendance to document the time in which committee members enter and/or exit the respective committee meetings. Due to this lack of time attendance documentation, we are not able to verify that State employees who serve on legislative committees are not paid from more than one tax-funded source.

OBJECTIVE 3

Review all allegations related to dual employment received by AOA that fall under the audit period.

There were no allegations received by either the AOA Hotline or the State Auditor during Fiscal Year 2007.

FINDINGS AND RECOMMENDATIONS

DELAWARE TECHNICAL AND COMMUNITY COLLEGE

Finding #1 – No Compensatory Time Policy

Delaware Technical and Community College (DTCC) does not have formal written policies and procedures for administering compensatory time for all employees.

Written policies and procedures are the baseline for a sound internal control structure and are a requirement to ensure control objectives are met. The *State Budget and Accounting Manual* states, "a well designed system of internal controls must include written policies and procedures to ensure that each control objective is met."

Recommendation

DTCC develop and implement written policies and procedures for administering compensatory time for all employees. The policies and procedures should include but are not limited to the following:

- Employees eligible/ineligible for compensatory time as well as employees subject to the dual employment law.
- Documentation of the District's process for accumulating hours to be charged.
- Timelines for the submission of employee records and the posting of vacation/compensatory time charges.
- Definitions of the spreadsheets or databases used to record time.
- Balance limitations (if applicable).
- Approval process for both the earning and use of compensatory time.
- Process for tracking compensatory time and reporting balances to employees.
- Process for reconciling and reviewing compensatory time on a periodic basis (i.e. monthly, quarterly, by pay cycle).

Auditee Response

The College has a written comp time policy that covers all employees who are entitled to overtime under the Fair Labor Standards Act (FLSA) or have been given the same as a matter of College policy, which are all merit comparable Plan B and Plan C employees, with the exception of Chief Legal Counsel and the Chief Technology Officer. Plan A employees (faculty) and Plan D employees (administrators) are exempt from the overtime provisions of the FLSA and are therefore not entitled to compensatory time. However, we have determined that it is in the best interests of the College and its educational mission to reserve the flexibility to give comp time to some FLSA exempt employees in appropriate circumstances without providing comp time to every other employee within the same salary plan. For example, academic guidance counselors are Plan A employees who are exempt from the overtime provisions of the FLSA. Counselors are required to work significant hours in excess of their normal workweek during registration periods at the beginning of the Spring and Fall Semesters. Those employees have been compensated in the past for the additional time that they are required to work during registration under a supplemental contract when funding was available. However, when funding is not available, those employees have been given comp time in lieu of a supplemental contract. When that occurs, all affected

FINDINGS AND RECOMMENDATIONS

employees are treated equally, and without regard to dual employment (or any other) status. Written guidelines for the same exist and have been provided in connection with past Dual Employment Audits.

RED CLAY CONSOLIDATED SCHOOL DISTRICT

Finding #1 – Policies & Procedures

Red Clay School District does not have formal, written policies and procedures for administering the dual employment law.

Title 29, Chapter 58, §5821 (c) states, "the State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole, and of its various governmental jurisdictions, are not paying employees or officials from more than 1 tax-funded source for duties performed during coincident hours of the workday."

Written policies and procedures are the baseline for a sound internal control structure and are a requirement to ensure control objectives are met. The *State Budget and Accounting Manual* states, "a well designed system of internal controls must include written policies and procedures to ensure that each control objective is met." In addition, comprehensive written policies and procedures are important to ensure compliance with laws and regulations.

Due to the lack of policies and procedures, the District is not consistently reporting docked time. Out of 46 legislative dates tested for one District employee subject to the dual employment law, 18 were processed in the following pay period and one was processed five months subsequent to the meeting date.

Our examination of time records for this employee for Fiscal Year 2007 disclosed the following:

- The District docked the employee's pay twice for legislative dates March 13 through March 15, 2007 resulting in an underpayment of 7.25 hours or \$417.20.
- The District did not dock the employee's pay for attendance at a legislative session on April 5, 2007 resulting in an overpayment of .75 hours or \$43.16.
- The District did not properly dock the employee's pay on January 16, 2007, resulting in an underpayment of .25 hours or \$14.39.
- The District did not properly dock employee's pay for lunch on June 19 and June 21, 2007, resulting in an underpayment of 1 hour or \$57.55.
- The District did not properly dock the following legislative dates due to totaling of hours and minutes resulting in an overpayment of 2.42 hours or \$139.26: January 23 through January 25; March 13 through April 4; April 24 through April 26; May 8 through May 17; and June 12 through June 28.

As a result of the above discrepancies, the District underpaid the employee a total of 5.33 hours or \$306.72.

FINDINGS AND RECOMMENDATIONS

Recommendation

Red Clay School District develop and implement written policies and procedures for administering the dual employment law to ensure each employee's pay is correctly reduced for coincident hours. These procedures should include but are not limited to the following:

- Employees eligible/ineligible for compensatory time as well as employees subject to the dual employment law.
- Documentation of the District's process for accumulating hours to be charged.
- Timelines for the submission of employee records and the posting of vacation/compensatory time charges.
- Definitions of the spreadsheets or databases used to record time.
- Balance limitations (if applicable).
- Approval process for both the earning and use of compensatory time.
- Process for tracking compensatory time and reporting balances to employees.
- Process for reconciling and reviewing compensatory time on a periodic basis (i.e. monthly, quarterly, by pay cycle).

In addition, the District should reimburse 5.33 hours or \$306.72 to the employee. District management may either increase the employees' leave records by 5.33 hours or increase compensation by \$306.72.

Auditee Response

The Delaware Code indicates that the "State" will have written policies and procedures in place to administer dual employment. The District did not believe it was required to create separate policies and procedures to address dual incumbencies as long as it followed the state requirements. A written policy will be put into place for future.

The District and employee have agreed to have all documents for the preceding week submitted by the following Monday for more timely deduction of salary and posting of attendance. This does not, however, ensure that all deducts will be able to be processed in the concurrent pay cycle.

The employee noted the April 5th omission and called it to the District's attention however the adjustment had not been made at the time of the audit.

The finding regarding improperly totaling hours and minutes is misleading in its presentation. The District was unaware of the magic "7 minute rule" in PHRST. This is the reason for the total discrepancies in bullet five. The District charged the employee for the EXACT time which he was absent on the dates indicated. So lunch was recorded as 30 minutes from 12:35 to 1:05. Under the rules of PHRST the individual is charged for extra time as if he were out from 12:30 until 1:10. Neither the employee nor the District was aware of this "rule."

Recommendations regarding compensatory time are not applicable, as the District does not permit accumulation of hours for compensatory time. The District will repay the employee a total of 5.33 hours for \$306.72.

FINDINGS AND RECOMMENDATIONS

NEW CASTLE COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT

Finding #1 – Not Docked Properly

Title 29, Chapter 58, §5822 states, "Any person employed by the State, or by any political subdivision of the State, including but not limited to any county, city or municipality, who also serves in an elected or paid appointed position in state government or in the government of any political subdivision of the State, including but not limited to any county, city or municipality, shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected or paid appointed position which requires the employee to miss any time which is normally required of other employees in the same or similar positions."

The examination of one elected official employed by the New Castle County Vocational Technical School District (NCCVTSD) for Fiscal Year 2007 disclosed the following:

- Five instances, in May 2007, where the District did not record time missed for an employee's attendance at a Legislative session. As a result of this oversight, the employee was overpaid 5 hours or \$201.55.
- Seven instances, in June 2007, where the District did not record time missed for an employee's attendance at a Legislative session. As a result of this oversight, the employee was overpaid 15.75 hours or \$634.88.
- Dual Employment Timesheets were not signed by the Superintendent for the months of May through June 2007, as required by District policy.

As a result of the above discrepancies, the District overpaid the employee 20.75 hours or \$836.43.

Recommendation

NCCVTSD recover 20.75 hours or \$836.43 from the employee. District management may either reduce the employee's leave records by 20.75 hours or reduce compensation by \$836.43.

In addition, the NCCVTSD should ensure that all Dual Employment Timesheets are submitted and properly reviewed and approved by the Superintendent as required by District policy.

Auditee Response

New Castle County Vocational Technical School District recognizes the importance of accurate record keeping. During the time period in question the department experienced administrative turnover and the loss of a key clerical employee to an extended leave. The employee in question clearly performed his responsibility by submitting the necessary paperwork on time for deduction. The issue presented itself prior to the submission to the Superintendents Office for approval. As a result the above referenced employee has been informed that the district will recover the funds through a payroll deduction schedule. Additional checks and balances have been put into place to ensure this does not occur in the future.

FINDINGS AND RECOMMENDATIONS

OFFICE OF THE CONTROLLER GENERAL

Finding #1 – Committee Meeting Time & Attendance

Delaware Code, Title 29, Chapter 58, §5821 (b) states, "The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday. Delaware Code, Title 29, Chapter 58, §5821 (c) states, "The State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole, and of its various governmental jurisdictions, are not paying employees or officials from more than one tax-funded source for duties performed during coincident hours of the workday."

The Office of the Controller General, in taking attendance at certain committee meetings, does not record time attendance to document the time in which committee members enter and/or exit the respective committee meetings. Due to this lack of time attendance documentation, we are not able to verify that State employees who serve on legislative committees are not paid from more than one tax-funded source.

The AOA has identified an instance, during the course of fieldwork, where a legislator has chosen to remain at their primary State job, rather than attending a scheduled committee meeting or legislative session, thus receiving compensation from two State sources, concurrently. This instance is detailed in the table below:

Agency	# Employees	# Overlap Hours	\$ Pay for Overlap Hours
Delaware Technical & Community College	1	1.25	\$ 29.10

In this instance, the current Dual Employment statute does not provide any requirement on the part of legislators to dock their legislative pay, and therefore, there are no remedies to address activities that directly conflict with the Legislature's own findings as stated in §5821 (b).

Currently, a legislator who chooses to remain at their primary State job in lieu of attending a scheduled meeting or session of the General Assembly does, in fact, receive compensation from two State sources, concurrently. As an example, a legislator who works at their primary State job from 8 a.m. to 1 p.m. before leaving to attend a committee meeting that commenced at 10 a.m., would receive compensation from both their primary State job and their legislative pay for the overlap time of three hours (10 a.m. – 1 p.m.); pay is not docked for time not spent at the committee meetings due to the lack of formal time attendance records maintained by the Office of the Controller General.

We recommend, that the General Assembly revisit the current statute regarding Dual Employment and amend to resolve this issue. See **Appendix B** for the Attorney General's Opinion regarding legislative committee meetings.

FINDINGS AND RECOMMENDATIONS

Recommendation

All committees should maintain detailed sign in/out sheets for each committee meeting as attendance record documentation. The Office of the Controller General should establish clear policies and procedures requiring both the Office of the Controller General and/or the committee chairs to maintain time attendance records in addition to the existing process of attendance listings, which detail the individuals present at the meetings. These additional time attendance records should include the time in which the State employee who is also an elected or appointed official enters all committee meetings as well as time out when leaving the meeting prior to its completion.

Auditee Response

See **Appendix A** to this report for the auditee response received from the Controller General.

STATUS OF PRIOR YEAR FINDINGS

The following summarizes the status of the findings and recommendations put forth in the *Statewide Dual Employment Performance Audit* for the year ended June 30, 2006:

Finding	Recommendation	Status
DELAWARE TECHNICAL AND COMMUNITY COLLEGE		
Delaware Technical & Community College (DTCC) does not have formal written policies and procedures for administering the dual employment law.	Develop and implement written policies and procedures for administering the dual employment law.	Implemented.
DTCC does not have formal written policies and procedures for administering compensatory time for all employees.	DTCC develop and implement written policies and procedures for administering compensatory time for all employees.	Not Implemented. See current year finding and recommendation.
The examination of the elected official employed by DTCC, Wilmington Campus, for Fiscal Year 2006, disclosed three instances in June 2006, where the elected official recorded sick leave for time missed for the employee's attendance at a legislative session. In accordance with 29 Del C. §5822, DTCC charges an employee's compensatory time or annual leave or reduces his or her pay for time missed while serving in an elected position. As a result of incorrect use of sick leave, the employee owes 10.25 hours or \$427.83.	DTCC, Wilmington Campus, recover 10.25 hours or \$427.83 from the employee. DTCC's management may either reduce the employee's leave records or reduce compensation by \$427.83.	Implemented.

STATUS OF PRIOR YEAR FINDINGS

Finding	Recommendation	Status
<i>NEW CASTLE COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT</i>		
<p>The examination of two elected officials employed by the District, for FY 2006, disclosed the following:</p> <ul style="list-style-type: none"> Three instances, in April 2006, where the District did not record time missed for an employee's attendance at a Legislative session. As a result of an oversight, the employee owes 2.75 hours or \$132.99; One instance, in June 2006, where the District did not record time missed for an employee's attendance at a Legislative session. As a result of an oversight, the employee owes 2 hours or \$77.24. 	<p>New Castle County Vocational Technical School District recover 2.75 hours or \$132.99 from one employee and 2 hours or \$77.24 for the second employee. District management may either reduce the employees' leave records or reduce compensation by \$132.99 and \$77.24.</p>	<p>Implemented.</p>
<i>DEPARTMENT OF LABOR</i>		
<p>The examination of two elected officials employed by the Department of Labor (Department) for FY 2006, disclosed the following:</p> <ul style="list-style-type: none"> For one elected official, there were two instances in May 2006, where the Department did not record time missed for an employee's attendance at a Legislative session. As a result of an oversight, the employee owes 2.5 hours or \$42.37; For the second elected official, there was one instance in June of 2006 where the Department did not record time missed for an employee's attendance at a Legislative session. As a result, of the oversight, the employee owes 4.5 hours or \$151.97. 	<p>The Department of Labor recover 2.5 hours or \$42.37 from the first elected official and collect 4.5 hours or \$151.97 from the second elected official. Department management may either reduce the employees' leave records or reduce their compensation by \$42.37 and \$151.97.</p>	<p>Implemented.</p>

STATUS OF PRIOR YEAR FINDINGS

Finding	Recommendation	Status
<i>CAPITAL SCHOOL DISTRICT</i>		
The examination of the elected official employed by Capital School District (the District) disclosed an instance where the District did not record sufficient time missed for an employee's attendance at a legislative session. During the review it was noted that on May 11, 2006, the former employee's time sheet reported that the planning period was from 12:30 p.m. to 1:45 p.m. which reflected a half hour overcharge. The contract between the District and Teachers allowed for a planning period the length of an instructional period. The former employee owes .50 hour or \$19.03 because the District did not deduct the correct amount of time for the planning period.	Capital School District must recover 0.50 hours or \$19.03 from the former employee. Since the District no longer employs the employee, District management should request a cash payment. In addition, the District needs to establish a written policy regarding the intended and proper use of duty free planning period.	Partially Implemented. The District recovered \$19.03 from the former employee. The District has not established a written policy regarding the intended and proper use of the duty free planning period since it is a negotiated item with the Capital Educators Association. This topic will be addressed in the negotiation process in 2008.

DISTRIBUTION OF REPORT

Copies of this report have been distributed to the following public officials:

Executive

The Honorable Ruth Ann Minner, Governor, State of Delaware
The Honorable Richard S. Cordrey, Secretary, Department of Finance
The Honorable Jennifer W. Davis, Director, Office of Management and Budget
The Honorable Thomas B. Sharp, Secretary, Department of Labor
Ms. Trisha Neely, Director, Division of Accounting, Department of Finance

Legislative

The Honorable Russell T. Larson, Controller General, Office of the Controller General
The Honorable Thurman Adams, President Pro Tempore, Delaware State Senate
The Honorable Terry R. Spence, Speaker of the House, Delaware House of Representatives

Other Elective Offices

The Honorable Joseph R. Biden III, Attorney General, Office of the Attorney General

Other

Ms. Janet Wright, Esq., Commission Counsel, Public Integrity Commission
Dr. Allen L. Sessoms, President, Delaware State University
Dr. Orlando J. George, Jr., President, Delaware Technical and Community College
Dr. Steven H. Godowsky, Superintendent, New Castle County Vocational Technical School District
Dr. Michael D. Thomas, Superintendent, Capital School District
Dr. Robert J. Andrzejewski, Superintendent, Red Clay Consolidated School District



STATE OF DELAWARE
OFFICE OF THE CONTROLLER GENERAL
LEGISLATIVE HALL
DOVER, DELAWARE 19901

November 15, 2007

The Honorable R. Thomas Wagner, Jr.
Auditor of Accounts
401 Federal Street
Townsend Bldg.
Suite One
Dover, DE 19901

Re: Dual Employment Audit

Dear Mr. ~~Wagner~~:

In response to your November 5 letter regarding dual employment I offer the following:

Attendance of members of the Joint Finance and Bond Committees at all committee meetings is duly recorded by one of the attaches employed to keep such records as part of their responsibilities. We do not record the exact time of arrival or departure. In point of fact, it is not possible to record the constant movement of legislators nor is it of any particular value to either ourselves or you for audit purposes.

A legislator who is also employed by the State in some other capacity must record the fact that they are not at their State job whether they're going to a committee hearing, the general session of the House or Senate or simply going to the doctor or a grocery store. All State agencies require documented time sheets from their respective agencies. These time sheets are used for Time and Labor reports for the purpose of paying employees.

Legislators who are members of the JFC or Bond committees are paid a stipend for their work on these committees. The stipend (and legislative salary) is paid whether they attend the meetings or not. Therefore, it doesn't make any difference if we record actual times of attendance or not.

The only way there can be abuse of dual payments is if they do not record their absence from their primary job.

If you require further clarification on this issue, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Russell T. Larson".

Russell T. Larson
Controller General

Cc: Frank N. Broujos, Deputy Attorney General
Keith R. Brady, Assistant State Solicitor



Appendix B

JOSEPH R. BIDEN, III
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499
TTY (302) 577-5783

February 21, 2008

The Honorable R. Thomas Wagner, Jr.
Auditor of Accounts
401 Federal Street
Townsend Building, Suite 1
Dover, Delaware 19901

ATTORNEY-CLIENT PRIVILEGED
AND CONFIDENTIAL

RE: Legislative Committee Meetings

Dear Mr. Wagner:

Chief Administrative Auditor Stacey Wynne has asked this office whether time should be “docked” from a State legislator who remains at his or her State job and does not attend a simultaneously scheduled meeting of a legislative committee of which the legislator is a member.¹ We conclude that the relevant statute does not authorize the legislator’s State job pay to be docked under your scenario.

The General Assembly’s findings on dual employment are recited in the State Compensation Policy (the “Policy”) at 29 *Del.C.* §§ 5821(b)² and 5821(c)³ (the “Findings”). The Findings convey the General Assembly’s expectation that so-called “double-dipping” should not occur under *any* circumstances. The provision that implements the Findings states in pertinent part:

Any person employed by the State ... who also serves in an elected ... position ... shall have his or her pay reduced on a prorated basis for any hours or days missed during the course of the employee's normal workday or during the course of the employee's normal workweek while serving in an elected ... position which requires the employee to miss any time which is normally required of other employees in the same or similar positions.

29 *Del.C.* § 5822(a) (Emphasis added).

¹ It is my understanding from your Office that State legislators are paid a stipend for committee membership and that no dollar amount is allocated per meeting.

² “The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday.”

³ “The State should have in place clear policies and procedures to ensure that taxpayers of the State as a whole ... are not paying employees or officials from more than 1 tax-funded source for duties performed during coincident hours of the workday.”

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The plain meaning of this provision requires the State legislator be away from the job physically (actually "miss" time) in order for a reduction in pay to occur. The language of the Policy is also unambiguous in that only the State job pay can be docked. There is no corresponding provision that permits a legislator's General Assembly pay to be docked when a legislator is absent from legislative business.

Further support for this interpretation is found in the legislative history of the Policy. Your scenario was raised and discussed during the Senate debate.⁴ While noting that a legislator has a moral obligation to attend legislative sessions, the General Assembly chose not to create a statutory remedy for the situation where a legislator chooses to remain at his or her State job during a legislative session (thus receiving State funds for both positions during the same time period). As a result, each legislator in this situation has the discretion to double-dip without the consequences set forth in the Policy.

We believe this situation is inconsistent with the express Findings of the Policy. Nonetheless, given our review of the legislative history and the plain meaning of the statute, we also must reach a conclusion that is inconsistent with the Findings. We conclude the General Assembly did not intend that a legislator's State employment pay be docked when that legislator remains at his or her State job during the time scheduled for that legislator to attend a committee meeting.

⁴ *President [of the Senate]:* Senator Vaughn.

Senator Vaughn: Thank you, Mr. President. A question to the sponsor: Suppose a State employee stays on his job and does not come to the General Assembly to serve. How does your bill handle that situation?

* * *

President: Senator Connor?

Senator Connor: Thank you, Mr. President. Senator, the question is answered to the fact that there is no time sheet on that particular day because there are no coincident hours on that particular day shown. The individual does not show up in the Senate. The individual stays in his place of employment. There is no time sheet turned in. There's no sign-off on the time sheet. There's no coincident hours. So the individual is not docked from being at his normal place of work since that's the place where his responsibility has not been shirked. Now whether that creates a problem because the individual is paid from the State at the same time, that's his responsibility – a moral responsibility as well as a statutory responsibility to be here and acting on behalf of his constituency. If he's not here acting on behalf of his constituency, I think that matter will be resolved very quickly through the next election and through also hopefully other types of releases in the press and so forth that would force him into that situation.

President: Senator Vaughn.

Senator Vaughn: Mr. President, I agree with the Senator that the individual is obligated to be here, but from his response it's not clear to me whether under this bill he would be docked pay in the General Assembly pay.

President: Senator Citro.

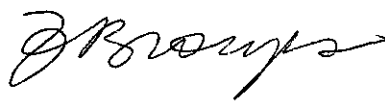
Senator Citro: Mr. President, I think I know what Senator Vaughn...you're talking about the Senator misses a day, but if you look down on the first page, under Policy, it says any person employed by the State or county, who serves in a State or county elected or paid appointed position, shall have his or her pay reduced on a prorated, we're talking about that State employee that's an elected official. There's nothing in here that says anything about the elected official. Maybe next term around that will be a good bill for you.

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We note that at the end of the Senate debate on the Policy, Senator Citro suggested that Senator Vaughn might wish to address this situation in the subsequent term of the General Assembly. No one acted on this suggestion. In light of the inconsistency noted above, you may wish to recommend that the General Assembly reconsider this issue as was previously suggested by the late Senator Vaughn.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

A handwritten signature in dark ink, appearing to read "F. Broujos", with a stylized flourish at the end.

Frank N. Broujos
Deputy Attorney General

Xc: Lawrence W. Lewis, State Solicitor
Jennifer D. Oliva, Deputy State Solicitor



Appendix C

JOSEPH R. BIDEN, III
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499
TTY (302) 577-5783

February 21, 2008

The Honorable R. Thomas Wagner, Jr.
Auditor of Accounts
401 Federal Street
Townsend Building, Suite 1
Dover, DE 19901

**ATTORNEY-CLIENT PRIVILEGED
AND CONFIDENTIAL**

**RE: Applicability of Dual Employment Statute
To University of Delaware Employees**

Dear Mr. Wagner:

You have asked this Office whether the Office of the Auditor of Accounts ("AOA") is required to review time records of University of Delaware ("University") employees to evaluate compliance with the State Compensation Policy ("Compensation Policy") at 29 *Del.C.* § 5821, *et seq.* (commonly referred to as the "dual employment statute" or "double-dipping law"). You have also asked whether the AOA should conduct a review if the employees' salaries are not paid from a State tax-funded source.

The short answers to your questions are: (1) yes, the AOA must review the time records of elected State and other paid appointed officials working at the University of Delaware to evaluate compliance with the Compensation Policy; and (2) no, that review does not include employees who are not paid from a tax-funded source while working at the University.

The Delaware General Assembly's findings regarding the enactment of the Compensation Policy express its clear intention to prohibit the practice commonly referred to as "double-dipping".¹ Pursuant to 29 *Del.C.* § 5823(a), the State Auditor must conduct an annual audit of time records of any person who serves as a State official and, in addition, is a State employee to ensure no one is paid from more than one tax-funded source for coincident hours of the day (i.e., "double-dipping"). The Compensation Policy applies to "any person employed by the State", "any political subdivision of the State,

¹ 29 *Del.C.* § 5821(b) states: "The members of the General Assembly believe that the taxpayers of Delaware should not pay an individual more than once for coincident hours of the workday."

including but not limited to any county, city or municipality.”² Accordingly, the first issue presented is whether, for purposes of the Compensation Policy, employees of the University are employees of the State.

A. Are Employees of the University Employees of the State Subject to the Compensation Policy?

While this is an issue of first impression, we conclude for the reasons that follow that employees of the University are employees of the State subject to the Compensation Policy.

As stated above, the Compensation Policy is expressly applicable to “[a]ny person employed by the State.”³ Moreover, the “findings” section of the statute references all officials employed by “state agencies, educational and other institutions, and other jurisdictions of government within the State.”⁴ While the Compensation Policy, at Chapter 58 of Title 29, is silent on its face as to the meaning of either the term “employee of the State” or “State agency,” alternative subchapters of Chapter 58 specifically and uniformly define these terms.

29 Del.C. §§ 5804(11) and 5831(a)(8) define the term “State agency” broadly to include “any office, department, board, commission, committee, court, school district, board of education *and all public bodies existing by virtue of an act of the General Assembly* or of the Constitution of the State....” (Emphasis added). Similarly, 29 Del.C. §§ 5804(12)a.1. and 5831(a)(9), define the term “State employee” as any person who “receives compensation as an employee of a state agency....”

The basic tenets of statutory interpretation teach that the meaning given to the terms “State employee” and “State agency” by the General Assembly in subchapters one and four of Chapter 58 should be applied to the Compensation Policy in subchapter three of the same chapter. When a court interprets a statute, the import of any word or phrase is to be gleaned from the context and statutes *in pari materia*.⁵ As explained by the Delaware Supreme Court in *Coastal Barge Corp.*, when interpreting a statute, “each part or section of that statute should be read in light of every other part or section to produce a harmonious whole.”⁶ The terms “State agency” and “State employee” are used consistently throughout Chapter 58. Thus, it is reasonable to conclude that the General Assembly intended the definitions of those terms to be applied consistently throughout the Chapter.

² 29 Del.C. § 5822(a)

³ *Id.*

⁴ 29 Del.C. § 5821(a)

⁵ *Fantasia Restaurant & Lounge, Inc. v. New Castle County Bd. of Adjustment*, 735 A.2d 424, 431 (Del. Super. 1998), *aff’d*, 734 A.2d 641 (Del. 1999)

⁶ *Coastal Barge Corp. v. Coastal Zone Industrial Control Bd.*, 492 A.2d 1242, 1245 (Del. 1985)

The question that remains is whether the University falls within the definition of “State agency” provided in Chapter 58. The University was chartered in 1833 by statute.⁷ The General Assembly created the University as a corporate entity, gave the University its powers, and appointed the original Board of Trustees. Moreover, the University is, and has always been, subsidized by taxpayer dollars appropriated by the General Assembly. The University’s statutory origin and these other factors convince us that the University falls squarely within the broad definition of “State agency” in Chapter 58: it is a “public bod[y] existing by virtue of an act of the General Assembly.”⁸ Accordingly, University employees are employees of the state subject to the Compensation Policy.

This conclusion is further supported by the decisions of the Delaware Courts addressing whether the University is a State agency.⁹ The cases reveal that the University is a hybrid entity and its status as a State agency is not clearly defined but rather is dependent on the context of the statutory analysis. In other words, the University may be a State agency for certain purposes and not for others.

Delaware Courts have consistently held that remedial statutes are to be liberally construed in order to achieve their purpose.¹⁰ Indeed, the Delaware Supreme Court has stated that “[i]t is of course fundamental that in construing a Statute, the Court must seek to ascertain and give effect to the intention of the Legislature as expressed in the Statute itself.”¹¹ The Compensation Policy is a remedial statute intended to advance the General Assembly’s express policy of protecting State taxpayers from paying State employees twice for coincident hours of the day. Accordingly, a liberal interpretation of the definition of “State agency” in the context of the Compensation Policy warrants the inclusion of the University to achieve the General Assembly’s goals.

Our analysis, however, does not end there. We must also evaluate whether the University’s enabling statutes restrict the authority of the State Auditor to review the time records of University employees to evaluate compliance with the Compensation Policy.

⁷ *Parker v. Univ. of Delaware*, 75 A.2d 225, 228 (Del. Ch. 1950)

⁸ 29 Del.C. § 5804(11); 29 Del.C. § 5831(a)(8)

⁹ Compare *Univ. of Delaware v. Keegan*, 318 A.2d 135, 137 (Del. Ch. 1974) (“There is [] no doubt that [the University] is a public institution and thus an agency of the State of Delaware under the common law and under the constitutional test required by the Fourteenth Amendment [in determining whether decision of the Trustees to ban religious services on University property was governmental action].”) (citing *Parker*), *rev’d on other grounds*, 349 A.2d 14 (Del. 1975), *cert. denied*, 425 U.S. 945 (1976) and *City of Newark v. Univ. of Delaware*, 304 A.2d 347 (Del. Ch. 1973) (holding that the University as a State agency is immune from city zoning ordinances), with *Rumsey Elec. Co. v. Univ. of Delaware*, 334 A.2d 226, 229 (Del. Super. 1975) (“In the contractual area [the University’s] status appears to have been legislatively defined [because i]n 1964, by specific enactment, the General Assembly conferred upon the University’s Board of Trustees ‘the entire control and management’ of its affairs. [Therefore] the University does not contract as a state agency.”), *aff’d*, 358 A.2d 712 (Del. 1976) and *Gordenstein v. Univ. of Delaware*, 381 F. Supp. 718, 725 (D. Del. 1974) (“[U]niversity is a financially independent and substantially autonomous entity [and is] not a state agency” entitled to sovereign immunity under 11th Amendment to the U.S. Constitution in an action claiming damages regarding denial of tenure.)

¹⁰ See *Layfield v. Hastings*, 1995 WL 419966 at *3 (Del.Ch. July 9, 1995)

¹¹ See *Keys v. State*, 337 A.2d 18, 22 (Del. 1975)

B. Do the University's Enabling Statutes Restrict the AOA from Reviewing the Records of University Employees to Evaluate Compliance with the Compensation Policy?

We conclude for the reasons detailed below that University's enabling statutes limit the AOA's audit authority with respect to the Compensation Policy to those employees who are (1) elected or appointed State officials and (2) paid from a tax-funded source while working at the University.

The University's enabling statutes are set forth in Chapters 51 through 57, Title 14 of the Delaware Code. They provide the University, through its Board of Trustees, substantial autonomy to manage its own affairs, including matters relating to employment.¹² They also place limitations on the authority of the State Auditor to audit the books and records of the University.¹³

With regard to the University's autonomy to manage its own affairs, section 5106(b)(1) states:

(1) All authority with respect to salaries and compensatory payments or benefits, as well as other terms of employment, of any and all University personnel, and individual salaries or salary increases or other benefits ***do not have to be reported or justified to any official or agency of the State***

On its face, this subsection grants the Board of Trustees plenary authority over its hiring decisions, salaries, and how it allocates its resources to those salaries. It does not, however, empower the Board or the University to permit activity that would contravene the Compensation Policy. Accordingly, section 5106(b)(1) has no bearing on the University employees' legal obligation to adhere to the Compensation Policy.

With regard to the AOA's authority to audit the University, 29 Del.C. § 2906(h) states: "The Auditor of Accounts shall conduct audits of the State-funded portion of the finances of the University of Delaware as authorized by § 5109 of Title 14." Section 5109 provides, in pertinent part:

The accounting records of the University may be audited by the Auditor of Accounts of the State or such other auditing official as the General Assembly may from time to time appoint. **Neither this nor any other law of this State, however, shall hereafter be construed as**

¹² 14 Del.C. § 5106(a) states: "The Board of Trustees shall have the entire control and management of the affairs of the University. The Board may exercise all the powers and franchises of the University, appoint and remove all subordinate officers and agents, and make bylaws as well for their own government as that of the University."

¹³ 29 Del.C. § 2906(h)(expressly stating AOA's authority to audit the University is limited by § 5109)

imposing any duty upon, or creating the occasion for, any state official (with the exception of such state officials as may from time to time also be Trustees of the University) to audit, question or inquire into the receipt, handling or expenditure of any funds coming to the University from any source other than a state appropriation, provided, however, that if the University should hereafter commingle funds which came from a state appropriation with other funds, the audit of state appropriated funds may be made complete even if in the process of doing so, because of such commingling, nonstate funds have to be audited as well. (Emphasis added).¹⁴

Section 5109 expressly grants the State Auditor the authority to audit the University's "receipt, handling or expenditure" of State appropriations. Significantly, there appears to be no restriction on that authority relative to funds appropriated for employees' salaries and the legislatively-designated use of those funds.¹⁵ Section 5109 does, however, prohibit the AOA from exercising his audit authority to non-state appropriations.¹⁶ Thus, while there is no basis for interpreting section 5109 as exempting the University's state-funded employees from compliance with the Compensation Policy, it is clear that the AOA may not audit privately-funded University employees.

We further note that both sections 5106(b) and 5109 of Title 14 were enacted in 1964.¹⁷ The Compensation Policy, on the other hand, became effective on January 1, 1987.¹⁸ As the General Assembly is presumed to have been aware of its pre-existing enactments when enacting the Compensation Policy (including the autonomy it conferred upon the University), it is significant that it did not expressly exempt the University (or its employees) from the Policy's coverage.¹⁹

In any event, to the extent that University employees are compensated with State-appropriated funds and participate in the Delaware Public Employees Retirement System²⁰, the requirement that they comply with the Compensation Policy is consistent with the underlying public policy prohibiting "double-dipping".²¹ Interpreting the above-

¹⁴ 29 Del.C. § 2906(h) states that if AOA outsources the audit work under § 5109, "the contractor conducting the audit shall be selected jointly by the University of Delaware and the Auditor of Accounts."

¹⁵ See *Gordenstein* at 722 ("Although state officials are authorized to audit the University [of Delaware]'s finances, their inquiry is strictly limited in scope to the University's handling of state appropriations.") (citing 14 Del.C. § 5109)

¹⁶ *Id.*

¹⁷ 54 Del. Laws, c. 256, §§ 1 and 2, respectively.

¹⁸ 65 Del. Laws, c. 488, § 1

¹⁹ See *Eller v. Bartron*, 2007 WL 4234450 at *7 (Del. Super. Nov. 27, 2007)(citing *Schribner v. Chonofsky*, 310 A.2d 924, 926 (Del. 1973))

²⁰ See 29 Del.C. § 5505(6)

²¹ See fn. 1

referenced provisions of both Titles 29 and 14 in a manner that would permit University employees to “double-dip” would produce an absurd and unreasonable result.²²

In sum and for the reasons detailed above, we conclude that: (1) the University is a State agency under the broad definition of that term applicable to the Compensation Policy; and (2) in the absence of any provision in the Delaware Code expressly exempting state-funded University employees from complying with the Compensation Policy, the Policy is applicable to state-funded University employees. Simply stated, the AOA has the authority to conduct a review of University employees to evaluate compliance with the Compensation Policy but that review is restricted to employees who are paid from a tax-funded source while working at the University.

If you have any questions or require any additional information, please do not hesitate to contact me.

Very truly yours,



Frank N. Broujos
Deputy Attorney General

Xc: Lawrence W. Lewis, State Solicitor
Jennifer D. Oliva, Deputy State Solicitor

²² *Coastal Barge Corp.* at 1247 (The so-called “Golden Rule” of statutory interpretation counsels against such a result.)